United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-2183

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In The

United States Court of Appeals

For The Second Circuit

ANONYMOUS, AN ATTORNEY ADMITTED TO PRACTICE IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Southern District of New York.

APPELLANT'S BRIEF AND SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-2183

ANONYMOUS, AN ATTORNEY ADMITTED TO PRACTICE IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF

Preliminary Statement

This appeal involves the scope of the doctrine of federal abstention in connection with disciplinary proceedings against an attorney pending before the Association of the Bar of the City of New York. More particularly, this appeal re-

lates to the scope of this Court's decision in Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972).

Plaintiff, an attorney admitted to practice in the State of New York,* appeals (131a)** from an order of the United States District Court for the Southern District of New York (Griesa, J.) denying his motion for an injunction pendente lite and granting defendants' cross-motion to dismiss the complaint on grounds of federal abstention (116a). Plaintiff sued to enjoin the City Bar Association from predicating disciplinary proceedings against him upon compelled testimony given by plaintiff before a New York County Grand Jury under a grant of immunity (4a). Plaintiff contends that the use of such testimony violates his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. The District Court declined to reach the merits of plaintiff's claim, but instead, held that "the doctrine of federal abstention applies. . .," a result the District Judge decided was "dictated by [this Court's] recent decision in Erdmann v. Stevens. . . ." (122a)

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* To protect the plaintiff's reputation this action, with leave of the Court, was commenced anonymously. Plaintiff's name was disclosed confidentially to the District Judge and will be disclosed to this Court on request. Respondents have consented to this procedure.

** References are to the pages of Appellant's Appendix.

The Factual Context and Statement of the Case

In December, 1965, one of plaintiff's clients, Melvyn Kaufman, a builder, requested plaintiff's assistance in connection with a zoning variance sought from the New York City Planning Commission by a competitor (10a). Plaintiff, unfamiliar with such matters, mentioned the problem to one Ralph Elyachar, an acquaintance in the building industry, who offered to assist Kaufman (11a).

On October 18, 1968, some three years later, plaintiff was called before a New York County Grand Jury investigating allegations that Kaufman and/or Elyachar may have been involved in the payment of bribes to Michael Freyberg, former New York City Tax Commissioner and James Marcus, former New York City Water Commissioner (11a, 32a, 33a). Under a grant of transactional immunity (11a) plaintiff testified at length. His testimony eventually led to the convictions of Kaufman and Elyachar for perjury before the Grand Jury (11a). Significantly, no one was ever charged with any criminal activity respecting the zoning matter with which Kaufman was concerned and the evidence presented to the Grand Jury established that plaintiff was unacquainted with either Freyberg or Marcus and had no dealings with them (114a).

Marcus was indicted for bribery and kickbacks involving the Jerome Avenue reservoir in the Bronx on December 18,

1967 (35a). Both Freyberg and attorney Herbert Itkin were prominently linked with the Marcus scandal and it appears that, in the fall of 1966, long after the plaintiff's involvement with Kaufman, Freyberg introduced Elyachar to Marcus in connection with matters entirely unrelated to Kaufman, the zoning variance or the plaintiff (33a).

Freyberg was ultimately convicted of lying to the Grand Jury about the Marcus affair and the Jerome Avenue reservoir. This led to the institution of disciplinary proceedings against him by defendants and his eventual suspension from legal practice (33a). Freyberg was convicted of perjury on December 17, 1970 and shortly thereafter defendants applied to the State Supreme Court for leave to examine the Grand Jury testimony relating to Freyberg's activities (35a, 45a). It appears that along with Freyberg's testimony released by order of the State Court (45a), the District Attorney forwarded the transcripts of plaintiff's testimony concerning Kaufman and Elyachar (36a).

Defendants took no action respecting plaintiff's Grand Jury testimony until January 11, 1973, over four years after plaintiff testified and some seven years after the operative events (36a). On January 11, 1973, defendants sent plaintiff a letter inviting him to discuss his Grand Jury testimony in connection with their review of "the conduct of certain attorneys

who appeared before the Grand Jury...in 1968 relative to an investigation into the possible undue influence upon the New York City Planning Commission" (46a). Plaintiff cooperated with defendants, readily acknowledged his testimony and submitted a voluntary statement on April 26, 1973 explaining his actions and denying any illegality or impropriety (36a).

Thereafter, on May 31, 1973, defendants brought formal disciplinary charges against plaintiff predicated solely and exclusively on his Grand Jury testimony (37a). A hearing was held before a Grievance Committee Panel on June 21, 1973 at which the charges were sustained and further disciplinary proceedings before the Appellate Division were recommended (37a). Thereupon, plaintiff obtained new counsel and moved to vacate the determination of June 21st and for the reinstitution of disciplinary proceedings de novo on the grounds, inter alia, that the use of plaintiff's compelled testimony before the Grand Jury violated his constitutional rights (37a). This motion was granted in its entirety (37a). A new charge letter was served on plaintiff on April 16, 1974 (16a) and a new hearing before a different panel of the Grievance Committee was scheduled for May 7, 1974 (16a). At the de novo hearing defendant Bonomi's office affirmed that defendants intended to rely exclusively on plaintiff's compelled testimony before the Grand Jury and offered the transcript in evidence (12a).

Plaintiff's counsel objected (12a). When that objection was overruled plaintiff instituted this suit in the federal court (4a) asserting jurisdiction under 28 U.S.C. §1331 and 1343, and 42 U.S.C. §1983. Plaintiff simultaneously sought a preliminary injunction and obtained a temporary restraining order preventing defendants from proceding (8a). Defendants cross-moved to dismiss (19a).

Plaintiff's motion for a preliminary injunction was denied on July 31, 1974 and the complaint was dismissed (116a). Plaintiff then filed his notice of appeal (131a) and has obtained a stay of proceedings from the District Court pending the outcome of this appeal.

The Committee on Grievances

Section 90 of the Judiciary Law of the State of New York governs the discipline of attorneys admitted to practice in this State but makes no mention of defendant Bar Association or its Committee on Grievances. Section 603.12 of the Rules of the Appellate Division, First Department, grants the Committee subpoena power in connection with the conduct of "a preliminary investigation of professional misconduct on the part of an attorney..."but any such subpoena must be issued by the Clerk of the Court in the name of the Presiding Justice and may not be issued by defendants. The rules further provide that in connection with the conduct of a preliminary investigation, defendants are empowered to "take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths."

The actual procedures of the Committee on Grievances are contained in By-Law XIX of the Association of the Bar of the City of New York. The Committee, acting through subcommittees or panels, is empowered to "either dismiss or sustain the charges and, as to any charges sustained, shall either admonish the respondent or recommend that such charges be prosecuted in the Court." If prosecution is recommended, the panel must first submit a written report and recommendations to the

Executive Committee of the Bar Association which may "take such action upon such report as in its judgment is proper." If the Executive Committee approves recommendations for prosecution in Court, the matter is then referred to the Appellate Division which then appoints a special referee who conducts a hearing on the charges de novo. Of course, the Appellate Division is not bound by the recommendations of the Bar Association and may prosecute charges not initiated by the Bar Association.

In the case at bar, plaintiff's case has never been brought to the attention of the Appellate Division or even to the attention of the Executive Committee of the Bar Association. It has never proceeded beyond a subcommittee or panel in connection with a "preliminary investigation."

Questions Presented

1. Is a federal district court compelled to abstain from intervening to prevent the violation of an attorney's constitutional rights by the Grievance Committee of the Association of the Bar of the City of New York in connection with a preliminary investigation of the attorney's professional conduct?

[The District Court answered this question in the affirmative]

2. May the Grievance Committee of the Association of the Bar of the City of New York predicate disciplinary proceedings against an attorney leading to possible disbarment solely on the basis of his compelled testimony elicited by a Grand Jury under a grant of transactional immunity?

[The District Court declined to answer this question]

POINT I

WHERE, AS HERE, THERE IS NO PENDING STATE COURT PROCEEDING THE DOCTRINE OF FEDERAL ABSTENTION IS INAPPLICABLE

The doctrine of federal abstention as enunciated in Younger v. Harris, 401 U.S. 37 (1971) and applied by this Court in Erdmann v. Stevens, supra, to disciplinary action taken against an attorney applies only when there is an actual state court criminal prosecution or a quasi-criminal state court proceeding. In any event, the doctrine presumes the existence of a state court proceeding. Here there is no criminal prosecution pending. Here there is no state court proceeding of any kind pending. Hence, federal abstention does not apply and the District Court erred in dismissing the complaint.

In Younger v. Harris, supra, the Supreme Court held that a federal court should not enjoin a pending state criminal prosecution in the absence of a showing of bad faith, harrassment or...[other] extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harrassment." 401 U.S. at p. 53. This rule of federal abstention was recently applied by this Court in Erdmann v. Stevens, supra,

to a disciplinary proceeding initiated against an attorney by the Justices of the Appellate Division, First Department, on the grounds that such a proceeding was a "judicial inquiry" [458 F.2d at p. 1208] comparable to "a criminal rather than to a civil proceeding" [458 F.2d at p. 1209]. Relying on In Re Ruffalo, 390 U.S. 544 (1968), this Court regarded the Appellate Division's action as "of a quasi-criminal nature" and, therefore, concluded that there was "no sound reason for exempting a pending state court disciplinary proceeding from the principles of federal state comity underlying Younger and its companion cases." 458 F.2d at p. 1210.

The District Court in this case regarded itself as bound by Erdmann to decline jurisdiction over plaintiff's complaint (122a). In so doing, the Court below extended the doctrine of abstention to all disciplinary proceedings brought against attorneys whether pending before the Appellate Division or, as here, in the preliminary investigation stage before a panel of the Grievance Committee. This, it is submitted, is erroneous. While the state courts may well have "a unique interest in their relationship with attorneys practicing in those courts" (126a), the state courts have not yet taken cognizance of this plaintiff and the federal courts have a unique interest in protecting the constitutional rights of all citizens -- including attorneys.

Erdmann involved an attempt to enjoin a proceeding then actually pending before the State Court. Here, there is no action pending in court but only a preliminary investigation before a panel of the Grievance Committee. Whereas the case at bar seeks to halt a proceeding initiated by and pending before the Grievance Committee of the Bar Association, the Erdmann case involved an effort to enjoin action initiated by and pending before the state court. Significantly, in Erdmann, the court acted on its own and contrary to the recommendations of the Bar Association's Grievance Committee. Defendants here may make recommendations respecting the discipline of attorneys but only the Appellate Division may act on such recommendations and, as Erdmann clearly recognizes, the Appellate Division is not bound by the Committee's recommendations. See Dolphin v. Association of the Bar of the City of New York, 240 N.Y. 89 (1925); Petition of the Association of the Bar of the City of New York, 222 App. Div. 580 (1st Dept. 1928).

The District Court erred in holding that:

> "a disciplinary proceeding commenced by a Bar Association Committee and continued before the Court is all part of one judicially ordained process." (127a)

Section 90 of the New York Judiciary Law governs the discipline of attorneys and vests that responsibility in the various Appellate Divisions and not in any Bar Association or Grievance Committee. Subdivision 2 of Section 90 provides that:

"...the Appellate Division of Supreme Court in each Department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; . . ."

Subdivision 7 of Section 90 authorizes a majority of the Justices of the Appellate Division in each Department to:

"...appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings..."

The Appellate Division, First Department, has promulgated Section 603.12 of its Rules entitled "Preliminary Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath." This Rule empowers defendants to issue subpoenas and to take testimony under oath but only in connection with preliminary investigations. There is no statutory authority for the defendants or anyone else to conduct any judicial or quasi-judicial proceedings regarding alleged professional misconduct on the part of an attorney. The Bar Association's Grievance Committee is at best a "friend" of the State Court. Its recommendations are purely advisory and its role discretionary since the Appellate Division is not only free to disregard its recommendations but to proceed in the absence of such recommendations. People ex rel Karlin v. Culkins, 248 N.Y. 465 (1928). More-

over, even where a disciplinary proceeding is brought at the behest of defendants, the Court appoints a referree and holds a de novo hearing (120a). As the New York Court of Appeals held in the Dolphin case, supra:

> "When we survey and analyze the situation and course of procedure it seems to us quite clear that the Association simply discharges the duty of calling to the attention of the Appellate Division, under our law charged with the duty of supervising the conduct of an attorney, alleged misconduct and then, if the Appellate Division thinks that course should be pursued, discharges the further duty of prosecuting the accusation and presenting the evidence which will enable the court finally to decide whether it should exercise its disciplinary powers and that in following this course it occupies that status which might be occupied by any member of the profession and becomes a friend and agency of the court rather than a party. It is not a party in any accepted sense."

Thus, the rationale of Erdmann does not apply to the instant action because the state courts have not yet acted. There is no state proceeding of any kind let alone a state criminal prosecution. The considerations of comity underlying Younger v. Harris, supra, are not available to the defendants in this case. Defendant Bar Association is not a court and defendant Bonomi is not a judge.

Particularly instructive is this Court's more recent decision in Tang v. Appellate Division of New York Supreme Court, First Department, 487 F.2d 138 (2d Cir. 1973) where the plaintiff-attorney sought to maintain his federal action after the state court had rejected his federal constitutional claim.

There the plaintiff challenged the New York bar admission procedures and Judge Mulligan held that his federal action came too late because the state court had already acted so that plaintiff's only recourse was to appeal to the highest state court and thence to the U.S. Supreme Court. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). Significantly, Judge Mulligan held that the plaintiff-attorney in Tang could have brought his action in the federal court in the first instance but, having chosen the state court route, he could not switch in mid-stream. Judge Hays, concurring, held that the plaintiff was barred because the State Court's adverse determination was res judicata. Judge Oakes dissented on the grounds that the plaintiff-attorney had not really made a choice of forums and hence was free to invoke federal jurisdiction.*

In Tang, Judge Oakes, in dissent, anticipated the situation presented on this appeal when he noted as follows:

> "...There is dicta in Erdmann, 458 F2d at 1210, which on its face, would apply equally to disciplinary and admission proceedings. However, then Chief Judge Friendly, writing for a three-judge court in Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 124 (S.D.N.Y. 1960), aff'd, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.

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* Judge Oakes also pointed out that the Committee on Character and Fitness which passes on the eligibility of attorneys for bar admission was a proper defendant in an action under 28 U.S.C. ¶1983. Certainly, if the Character Committee is a fit defendant so is the Grievance Committee.

2d 749 (1971), explicitly rejected a comity-abstention argument in a direct attack on state bar admission procedures. Even application of the doctrine of 'comity' in the disciplinary context in Erdmann is open to dispute in Gibson v. Berryhill, 411 U.S. 564, 575-577, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973). See Polk v. State Bar of Texas, 408 F.2d 998, 1001-02 & n. 10 (5th Cir. 1973)."
[emphasis added] 487 F.2d at p. 146

The Court below rejected Judge Oakes' rationale and the applicability of Gibson v. Berryhill on the grounds that in Gibson "the disciplinary proceeding sought to be enjoined was before the State Board of Optometry, not any court or any committee acting under powers granted by a court" (124a). It is submitted that this is a distinction without a difference. The State Board of Optometry stands pari passu with the Grievance Committee relative to professional discipline. To place an attorney in a special category, separate and apart from other professionals, simply because of the supposed unique relationship between an attorney and the court before which he practices constitutes an invidious discrimination unwarranted by experience or constitutional necessity. Certainly, an attorney is entitled to no less protection under the U.S. Constitution and federal law than the physician, the dentist and the optometrist.

If the decision in Tang cast doubt on Erdmann, the Supreme Court's decisions earlier this year in Steffel v. Thompson, 415 U.S. 452 (1974) and Allee v. Medrano, 42 L.W. 4736 (1974),

make it clear that neither the absence of a pending state prosecution nor the failure to satisfy the bad faith or special circumstances standards of Younger v. Harris precludes a plaintiff threatened with prosecution from obtaining declaratory relief in federal court as to the consitutionality of state statutes either on their face or as applied. As the Supreme Court held in Steffel:

> "When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3). . .we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.... But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution has been commenced....
>
> * * * * *
>
> "We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." 415 U.S. at p. 474-5

In Allee, the Supreme Court, in dealing with an action brought under the Civil Rights Act [42 U.S.C. §1983] by a picketing union against Texas law enforcement officers, upheld the plaintiff's rights to seek federal court intervention by way of declaratory relief before the commencement

of a state criminal prosecution. The relation of Younger and Steffel was clarified in Allee as follows:

> "Younger and its companion cases are grounded upon the special considerations which apply when a federal court is asked to intervene with pending state criminal prosecutions. Steffel v. Thompson, 415 U.S. ____. Although both parties here have assumed the relevance of Younger, we have been unable to find any precise indication in the District Court opinion or in the record that there were pending prosecutions at the time of the District Court opinion or in the record that there were pending prosecutions at the time of the District Court decision. Indeed, the chronology of events gives rise to the contrary inference. Although the District Court issued its opinion in December of 1972, the union effort which was the source of this contest had been interrupted more than five years earlier. It seems likely that any state prosecutions initiated during the effort would have been concluded by that time unless they had been restrained by a temporary order of the federal court. But there is no indication that such an order was ever issued. Moreover, the injunctive relief granted does not appear to be directed at restraining any state court proceedings.
>
> If in fact there were no pending prosecutions, the relief could have impact only on future events in which the challenged statutes might be invoked by the appellants. Since this remains a live, continuing controversy, such relief would ordinarily be appropriate if justified by the merits of the case. Gray v. Sanders, 372 U.S. 368, 376.
>
> * * * * *
>
> ". . . it is not necessary for other reasons for us at this time to reach any Younger questions or the merits of the decision below as to the statute's constitutionality. We must remand for a determination as to whether there are pending prosecutions, although if there are none the appellees might still be threatened with prosecutions in the future since these statutes are still in force. But if there are only threatened prosecutions, and the appellees sought only declaratory relief as to the

> statutes, then the case would not be governed by Younger at all, but by Steffel v. Thompson, 415 U.S. _____, decided this Term. The District Court of course did not have the benefit of our opinion in Steffel at the time of its decision. We therefore think it appropriate to vacate the judgment of the District Court as to these statutes and remand for further findings and reconsideration in light of Steffel v. Thompson. If there are pending prosecutions then the District Court should determine whether they were brought in bad faith, for the purpose of harassing appellees and deterring the exercise of First Amendment rights, so that allowing the prosecutions to proceed will result in irreparable injury to the appellees. If there are no pending prosecutions and only declaratory relief is sought, then Steffel clearly controls and no Younger showing need be made." 42 L.W. at pp. 4740-1

The Court below incorrectly invoked the doctrine of federal abstention in this case. Defendants are not a quasi-judicial body and certainly are not part of the state court system. No state prosecution or proceeding is pending. Even if plaintiff may not be entitled to injunctive relief he is entitled, at the very least, to the declaratory judgment sought in his complaint determining whether the use by defendants of his compelled testimony elicited under a grant of transactional immunity before a Grand Jury violates his constitution l rights. See Perez v. Ledesma, 401 U.S. 82, 93 (1971) [separate opinion of Justices Brennan, White and Marshal].

Federal Courts are not compelled to abstain in cases where there are substantial Constitutional rights involving matters of professional fitness. Thus in Schware v. Board of

Examiners, 353 U.S. 232 (1957) and in Law Students' Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) the Supreme Court readily considered matters of character and fitness for admissions to the Bar. Certainly, if matters of Bar admission are cognizable on their merits by the Federal Court, matters of Bar removal or discipline should similarly be cognizable.

POINT II

THE DOCTRINE OF FEDERAL ABSTENTION IS INAPPLICABLE WHERE, AS HERE, DEFENDANTS HAVE ACTED IN BAD FAITH AND THERE ARE OTHER EXTRAORDINARY CIRCUMSTANCES PRESENT

Assuming, arguendo, that Younger v. Harris, supra, and Erdmann v. Stevens, supra are held to be applicable to disciplinary proceedings pending before the Bar Association, the doctrine of federal abstention is nevertheless inapplicable because of the special or unusual circumstances presented in this case. First, there is the inordinate delay on defendants' part in proceeding against plaintiff seven years after the operative events and five years after the defendants knew or should have known of his alleged involvement in such events. Second, there is the manifest futility in raising constitutional issues here sought to be adjudicated in the state courts which have already refused to recognize the validity of plaintiff's claims [See Point III, infra]. Third, there is the promise of the District Attorney not to refer plaintiff's testimony to the Grievance Committee for disciplinary action, a promise clearly breached by the District Attorney.

The abstention principle enunciated in Younger and applied in Erdmann does not apply where a plaintiff demonstrates bad faith, harassment or other extraordinary circumstances in which irreparable injury can be shown even in the absence of

bad faith or harassment. See, Lewis v. Kugler, 446 F.2d 1343 (3rd Cir. 1971); Fowler v. Vincent, 366 F.Supp. 1224 (S.D.N.Y. 1973); General Corporation v. Sweeton, 365 F.Supp. 1182 (N.D. Ala. 1973). Here, plaintiff testified before the Grand Jury late in 1968 respecting his 1966 involvement with Messrs. Kaufman and Elyachar (10a). In December 1968 and January 1969 newspaper articles appeared mentioning these events. In January 1971 defendants actually procured the Grand Jury minutes (45a). Nevertheless, no proceeding was initiated by defendants until 1973, some two years later. Moreover, the state court order releasing the Grand Jury minutes to defendants clearly relates to another attorney [Freyberg] and not to plaintiff so that it is questionable whether plaintiff's testimony is properly in defendants' hands (45a).

Defendants have never offered any justification for these inordinate delays and the Court below held that delay does not amount to bad faith or harassment as a matter of law (129a). This, it is submitted, is error. The unexplained and unjustified delay in this case is prima facie bad faith and harassment and, at the very least, the District Court should have held a hearing on this issue.

A hearing should also have been held respecting plaintiff's charge that the District Attorney had acted improperly by forwarding to defendants the transcript of plain-

tiff's Grand Jury testimony. Plaintiff alleges that he was assured in advance of testifying that this would not happen and the Court's order releasing testimony to defendants, on its face, relates to Freyberg and not to this plaintiff. Here, again, the Court below erroneously held that, as a matter of law, this could not be deemed bad faith within the meaning of Younger v. Harris, supra (130a).

Finally, even in the absence of manifest bad faith, the abstention doctrine should not have been applied in this case because the New York courts [as set forth in Point III of this Brief] have already pre-determined the constitutional issue adversely to plaintiff so that to permit the pending proceedings to continue would be of no avail. Where, as here, pending state prosecution does not afford an adequate remedy for the vindication of the federal constitutional rights at issue the federal courts must intervene. This is the clear mandate of Helfant v. Kugler, 484 F.2d 1277 (3rd Cir. 1973), a case similar in many respect to the case at bar.

The New York courts have consistently taken the position that the position of an attorney is sui generis such that he may be disbarred and thereby deprived of his means of livelihood solely on the basis of testimony extracted from him pursuant to a grant of immunity. Matter of Epstein, 37 A.D.2d 333 (1st Dept. 1971). The New York cases are predicated on

the proposition that disciplinary proceedings against an attorney are civil in nature whereas the privilege against self-incrimination and the granting of transactional immunity apply only in criminal proceedings. Zuckerman v. Gleason, 20 N.Y.2d 430 (1967) cert. denied, 390 U.S. 925 (1968); Matter of Klebanoff, 21 N.Y.2d 920 (1968), cert. denied, 393 U.S. 840 (1968).

The New York Courts have spoken. To raise the question again is but an exercise in futility.

POINT III

THE FOURTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS APPLIED TO STATE ACTION THROUGH THE FOURTEENTH AMENDMENT, PRECLUDE A STATE FROM IMPOSING UPON AN ATTORNEY THE PENALTY OF SUSPENSION FROM THE PRACTICE OF LAW SOLELY ON THE BASIS OF THE ATTORNEY's COMPELLED TESTIMONY BEFORE A GRAND JURY UNDER AN EXPRESS GRANT OF IMMUNITY AND PROHIBIT THE USE IN DISCIPLINARY PROCEEDINGS OF SUCH COMPELLED TESTIMONY

It stands uncontradicted on the record that the plaintiff, when called to testify before the Grand Jury, property invoked his Constitutional privilege against self-incrimination guaranteed to him by the Fifth Amendment to the United States Constitution. It is uncontradicted on the record that the plaintiff was then granted full transactional immunity, the broadest immunity possible under New York law. See, People v. Laino, 10 N.Y.2d 161 (1961); Code Crim. Proc. §619-c; CPL §190.40 Subd.2. Nevertheless, defendants seek to deprive plaintiff of his license to practice law on the basis of his otherwise immunized testimony.

The New York cases [Matter of Epstein, supra; Zuckerman v. Gleason, supra; Matter of Klebanoff, supra] sanction defendants' actions and are in manifest conflict with the decisions of the United States Supreme Court and of other jurisdictions which have considered the matter. In Spevack v. Klein, 385 U.S. 511 (1967), an attorney's right to

assert the privilege against self-incrimination in a disciplinary proceeding was upheld. The same right was sustained by the United States Supreme Court the following year in Gardner v. Broderick, 392 U.S. 273 (1968) and in Uniformed Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280 (1968). In these latter cases it was held that neither an attorney nor a public employee could be discharged for refusal to sign a waiver of Fifth Amendment rights before a Grand Jury or for refusing to answer questions in violation of Fifth Amendment rights before an administrative tribunal. The gravamen of the Supreme Court's decision was as follows:

> "Petitioners were not discharged merely for refusal to account for their conduct as employees of the City. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege. Three were asked to sign waivers of immunity before the Grand Jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on this basis. Garrity v. State of New Jersey, 385 U.S. 493 . . . (1967), in which we held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution of a witness, had not been decided when these twelve petitioners were put to their hazardous choice . . . They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally."

More recently, in United States v. U.S. Coin and Currency, 401 U.S. 715 (1971), the Supreme Court rejected the New York rule making the applicability of the privilege against self-incrimination dependent upon the distinction between civil and criminal proceedings, and held the privilege properly invoked in a forfeiture proceeding denominated as civil. The Supreme Court reiterated the doctrine enunciated almost a century ago that forfeiture proceedings are criminal in nature although they may be civil in form:

> "[B]ut as Boyd v. United States, 116 U.S. 616, 634 (1886), makes clear, 'proceedings instituted for purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes." 401 U.S. at p. 718

Forfeiture of the right to practice law, whether temporarily by suspension or permanently by disbarment, is no less a "criminal" punishment than forfeiture of one's property or one's money. Clearly, the seriousness of its personal and economic impact on the attorney involved is much greater. That the fact of suspension, as in the present case, serves the function of punishment is made clear by its implicit recognition that the penalized practitioner will be fit to serve as an attorney at law upon the termination of his suspension. The situation is even clearer in the case of disbarment. The question whether the Fifth

Amendment privilege against self-incrimination extends to the penalty of an attorney's suspension from the practice of law presents an important question under the Constitution of the United States and cannot be ignored. Its resolution should not depend upon archaic distinctions between "civil" and "criminal" proceedings. The action on the case has been abolished and there is but a single form of action in modern practice.

Upon being compelled to testify before the Grand Jury by the grant of immunity, after he invoked his Fifth Amendment privilege, plaintiff became entitled to immunity from all penalties within the scope of the privilege regardless of the intended reach of the grant.* The compulsion of incriminating testimony generates immunity from sanctions which are "criminal in nature," Ullmann v. United States, 350 U.S. 422, 431 (1956), whether or not the immunity is contemplated when the testimony is compelled. Garrity v. New Jersey, 385 U.S. 493 (1967). In Ullmann where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled might result in disqualification from Federal employment and other disabilities, the

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* The immunity thus conferred relates to all testimony given by plaintiff before the Grand Jury and any use that may be made thereof. Hence, plaintiff's failure to deny his testimony and his explanation thereof at the aborted first hearing before the Grievance Committee cannot be deemed a waiver as suggested by the District Court (129a). Once immunity became affixed, it became absolute and inviolate. Plaintiff had no reason to deny his testimony or to keep it confidential.

Supreme Court stated that a witness who was compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at p. 431. The use of compelled testimony in these proceedings, therefore, squarely poses the question whether the punishment of suspension imposed in a disciplinary proceeding is "criminal in nature" within the scope of the Fifth Amendment's prohibition against compelled, self-incriminating testimony. It is submitted that it does regardless of the form of the proceeding. Substantively disciplinary proceedings have the requisite "criminal" or punitive characteristics.

The denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for purposes of other constitutional provisions than the Fifth Amendment. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." In Re Ruffalo, 390 U.S. 544 (1968). Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's Bill of Attainder and

ex post facto prohibitions. Ex parte Garland, 4 Wall. 333, 377 (1867) [Legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"]; Cummings v. Missouri, 4 Wall. 277, 327 (1867) [this deprivation of the (right to pursue regular avocations) is punishment]; United States v. Lovett, 328 U.S. 303, 316 (1946) ["permanent proscription from any opportunity to serve the Government is punishment"]; United States v. Brown 381 U.S. 437 (1965) [disqualification from holding union office held punishment]. No reason is readily apparent why disqualification from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination.

Spevack v. Klein, supra, decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Plaintiff, however, under threat of contempt, was compelled to forego the privilege and supply inculpatory information. The fruits of this compulsion are the sole basis of these proceedings. Boyd v. United States, supra, held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment"

[116 U.S. at p. 622]. Coerced production of evidence to forfeit an attorney's right to practice law would appear to be comparable in penal effect to forfeiture of property. The policy of the exclusionary rule to discourage violation of the Constitutional protection would seem to preclude the use of evidence obtained in violation of the Fourth Amendment in a civil, as well as a criminal proceeding. Evidence tainted by an unreasonable search has been held inadmissible in an administrative proceeding which resulted in a cease and desist order. Knoll Associates, Inc. v. Federal Trade Commission, 397 F.2d 530 (7th Cir. 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents important considerations under the Fourth, as well as the Fifth Amendment to the United States Constitution.

the Court's attention is directed to the recent decision of the Florida Court of Appeals in Lurie v. Florida State Board of Dentistry, a copy of which is included as an addendum to this Brief. Here, a grant of immunity to a dentist pursuant to his compelled testimony about illegal transactions over a stolen car, was held to protect him against the use of his compelled testimony in an administrative proceeding. The Florida Court prevented the Florida State Board of

Dentistry from disciplining the respondent-dentist by reason of his compelled testimony on the following grounds here relevant:

> "Fifth Amendment freedoms are never lightly surrendered. Consequently, the state on its part should not be technically 'sharp' or narrow in honoring its immunity commitment. When it professes to extend total immunity by statute its judiciary should not circumscribe or hedge or renege in part its solemn promise with exceptions permitting imposition of certain penalties and forfeitures in administrative proceedings. To do so would not only debilitate the effectiveness of the immunity grant; it would also invariably serve to engender distrust for a state officer's promise. Fundamental fairness dictates an open and aboveboard agreement between both parties, the state and the witness. No hypocrisy or pretense can be indulged in by the state to break so solemn a pledge when a witness is compelled by law to testify."

Whereas the States have power to control the practice of law in their Courts, this power cannot be exercised so as to ignore Federally protected rights. Staud v. Stewart, 366 F.Supp. 1398 (E.D.Pa. 1973). The gravamen of the complaint herein is that plaintiff's Constitutional rights have been infringed. Federal District Courts clearly have jurisdiction to declare the scope and nature of the rights guaranteed to individuals by the Federal Constitution by virtue of Title 28 U.S.C. §1331 and Title 28 U.S.C. §1343. They also have jurisdiction, by virtue of the Civil Rights Jurisdictional Statute, over

the subject matter of civil rights actions by attorneys protecting their personal and property rights. Title 42 U.S.C. §1983. Thus, the complaint in this action clearly states a cause of action and defendants' cross motion to dismiss for failure to state a claim should have been denied. Hurley v. Van Lare, 365 F.Supp. 186 (S.D.N.Y. 1973); Evain v. Conlisk, 364 F.Supp. 1188 (N.D. Ill. 1973); Hampton v. Gilmore, 60 FRD 71 (E.D. Mo. 1973); In Re Bithoney, 486 F.2d 319 (1st Cir. 1973). See, also, Tang v. Appellate Division of New York Supreme Court, First Department, supra.

CONCLUSION

The judgment below should be vacated in all respects. Plaintiff is entitled to invoke the assistance of the federal Courts to protect his constitutional rights.

Respectfully submitted,

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ADDENDUM - DECISION OF THE FLORIDA COURT OF APPEALS IN LURIE v. FLORIDA STATE BOARD OF DENTISTRY

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973

DR. JACK LURIE,

Petitioner,

vs. Case No. 42,715

FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

Opinion filed October 10, 1973

Writ of Certiorari to the District Court of Appeal, Fourth District

Norbert Stettin of FRIEDMAN, BRITTON & STETTIN, for Petitioner

Richard L. Randle of SLATER & RANDLE, for Respondent

ERVIN, J.

We review on petition for writ of certiorari a per curiam without opinion decision of the District Court of Appeal, Fourth District, in Lurie v. Florida State Board of Dentistry, Fla.App., 264 So.2d 479.

From the record proper it appears we have jurisdiction for a certiorari review as will hereinafter appear.

The question to be decided is whether a grant of compelled testimony immunity from criminal prosecution which, at the time granted in 1967, included immunity from administrative proceedings based upon the same facts, would continue to render the recipient immune from later administrative proceedings despite the decision of Spradley v. State, Fla.1969, 224 So.2d 131.

The facts in the case are: On August 30, 1967 Petitioner was compelled to testify before the County Solicitor of Brevard County regarding alleged illegal transactions between himself and Arnold Rosenbaum. At that time charges were pending against Rosenbaum, who allegedly had been in possession of a stolen Cadillac and had made a false statement on an application for an automobile title certificate. The interrogation of Petitioner not only concerned the charges against Rosenbaum, but also involved matters relating to the operation of a stolen car ring in Brevard County and Petitioner's acquisition of two automobiles from Rosenbaum.

One year later Petitioner was informed against for receiving a stolen automobile and aiding Rosenbaum in the concealment of stolen property.

Petitioner sought a writ of prohibition from the Fourth District Court of Appeal, contending he was immune from prosecution under Section 932.29, F.S.1967, which provided that a person could not be excused from testifying in certain prosecutions on the ground he might incriminate himself, but when he did so testify he could not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify. . . ."

While that cause was pending, this Court on July 16, 1969 in Bradley v. Baron, Fla.1969, 228 So.2d 281, overruled Florida State Board of Architecture v. Seymour, Fla.1952, 62 So.2d 1. Seymour held the above-quoted portion of Section 932.29, which grants immunity from prosecution or from subjection to "any penalty or forfeiture," was not limited in application to criminal prosecutions,

but also provided immunity from subjection to administrative revocation of professional license proceedings. Headley, however, held that "the words 'penalty or forfeiture' when used in the entire context of Section 932.29 clearly refer only to a criminal penal of forfeiture." Under Headley, therefore, Section 932.29 grants immunity only from criminal prosecutions and may not be used to immunize one against loss of a professional license in an administrative proceeding as a result of grand jury testimony.

On September 19, 1969 the Fourth District Court of Appeal made absolute the writ of prohibition and held that Petitioner was immune from the criminal prosecution for his activities with Rosenbaum. State ex rel. Lurie v. Rosier, Fla.App.1969, 226 So.2d 825.

On June 22, 1971 Respondent Board of Dentistry filed a two-count accusation against Petitioner, a state licensed dentist, charging him with (1) wilful negligence and malpractice in the removal of a tooth, and (2) conspiracy and concealment of stolen cars. Petitioner filed a motion to dismiss, contending, among other things, that he was fully immune from any administrative penalty or forfeiture for his alleged stolen car actions because of Section 932.29 and the District Court mandate in State ex rel. Lurie v. Rosier, supra. The Board found him guilty as charged and on August 21, 1971 revoked his license for one year on the malpract charge and permanently on the concealing stolen automobile charge.

Petitioner filed a petition for writ of certiorari with the District Court of Appeal, Fourth District, that court per curiam without opinion denied the petition on June 22, 1972. See 264 So.2d 479.

We granted the petition for Writ of Certiorari because of conflict with this Court's decision in Florida Forest and Park Service v. Strickland, Fla.1944, 18 So.2d 251, where we held:

> "That where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." (Emphasis supplied.)

We have re-examined the cases of Headley v. Baron, supra, and Florida State Board of Architecture v. Seymour, supra, in the light of the circumstances of this case and also in the light of the weight of judicial authority throughout the nation on the question of citizens' immunities from the imposition of penalties and forfeitures in administrative proceedings where they are compelled to testify before grand juries, prosecuting officers, or courts concerning matters or things which might incriminate them. We are convinced now this Court was in error in overruling Florida State Board of Architecture v. Seymour, supra. See 9 Fla. Jur., Criminal Law § 276; 1 Fla. Jur., Administrative Law and Procedure § 82, and 68 A.L.R. 1503; 2 Am. Jur.2d Administrative Law §§ 267, 268, 269. Compare Shapiro v. United States, 335 U.S. 1, 92 L.Ed. 1787, 68 S.Ct. 1375, reh. den. 335 U.S. 826, 93 L.Ed. 388, 69 S.Ct. 9; Smith v. United States, 337 U.S.137, 93 L.Ed. 1264, 69 S.Ct. 1000, annotation

Where testimony is so compelled the person (witness) testifying should have the benefit of immunity statutes or other protections afforded by law. As Justice Terrell pointed out in the Seymour case, the guarantee must be as broad as the constitutional guaranty. He also said for the Seymour court, "A forfeiture is also a penalty and has to do with loss of property, position or some other personal

right . . ." and, "It is accordingly our view that a proceeding to revoke Appellee's certificate as an architect is akin to a prosecution to effect a penalty or forfeiture as contemplated by the (statute) . . ." 62 So.2d, text page 3. See State ex rel Vining v. Florida Real Estate Commission (Fla.) 221 So.2d 417 headnote two.

That the testimony Petitioner was compelled to give in to the County Solicitor of Brevard County will be immune category was resolved by the Fourth District Court's decision in State ex rel. Lurie v. Rozier, supra.

Immunity extended by the State under Section 932.29, F.S. 1967 in surrender of the Fifth Amendment privilege is not divisible so that the protection vouchsafed thereunder will only from criminal prosecution. This result can be ascertained from a cursory reading of Section 932.29, F.S. 1967:

> "No person shall be excused from attending and testifying . . . before any court or any investigation, proceeding or trial . . . but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding." (Emphasis suppl

As Justice Terrell stated in Seymour, supra, at 3: "Whether the prosecution, penalty or forfeiture has to do with a civil or crimi action is not material. The statute [932.29 F.S.] makes it appli cable to both."

Such an interpretation is not a minimal construction of the Legislature's enactment, but rather one which supports realist and honestly with the professed immunity grant. The State through authorized officials in granting immunity to witness acts totall for the State, including its licensing agencies. A professional state licensing board must respect the immunity granted similarly

must the prosecuting attorney. To be efficacious in securing testimo
of a citizen the immunity extended must be coextensive with all poss
governmental penalties and forfeitures, criminal or civil. Persons
holding professional licenses cannot be excepted from total immunity
protection.

Our recent holding in State ex rel. Vining v. Florida, Case No. 41,138 (April 4, 1973), supports the principle that immunity from the imposition of penalties extends to administrative proceedings. In that case a real estate broker was charged with several violations of the Real Estate License Law. He moved to quash the information alleging, inter alia, that the requirement of filing a sworn answer pursuant to Section 475.23(1) violated his right to remain silent guaranteed to him by the Fifth Amendment of the United States Constitution and Article I, Section of the Florida Constitution. In relying upon Spevak v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), we stated that the U. S. Supreme Court's logic of making available the constitutional privilege against self-incrimination to a lawyer in a disbarment proceeding

> ". . . [extends] as well to other types of administrative proceedings which may result in deprivation of livelihood. Certainly, threatened loss of professional standing through revocation of his real estate license is as serious and compelling to the realtor as disbarment is to the attorney. In succinct terms, it is our view that the right to remain silent applies to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood."

The immunity extended by the State under Section 932.29, F.S. serves as a partial in lieu replacement for the protection that otherwise would have been available to Petitioner Lurie under the Fifth Amendment, and while

> "It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any criminal case to be a witness against himself . . .' it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is involved, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory." In re Gault, 387 U.S. 1 at 49, 87 S.Ct. 1428 at 1455, 18 L.Ed2d 527 at 558 (1967).

Fifth Amendment freedoms are never lightly surrendered. Consequently, the state on its part should not be technically "sha or narrow in honoring its immunity commitments. When it professes extend total immunity by statute its judiciary should not circumscribe or hedge or renege in part its solemn promise with exceptic permitting imposition of certain penalties and forfeitures in admi trative proceedings. To do so would not only frustrate the effectiveness of the immunity grant; it would also invariably serve to engender distrust for a state official's promise. Fundamental fairness dictates an open and aboveboard agreement between both parties, the state and the witness. No duplicity or pretense can be indulged in by the state to break so solemn a pledge when a witness is compelled by law to testify.

There are those who would hyperbolically parade the horribles of felons disguised as physicians or lawyers preying on unsuspecting patients or clients under a cloak of governmental immunity. Such feared abuses and evils ordinarily never transpire because prosecuting officers exercise reasonable discrimination in granting statutory immunity. A certain degree of confidence must

not recklessly grant immunity to the extent of opening floodgates for great numbers of the unscrupulous to professionally victimize the public. It is to be noted that such officials will act so as to use this bargaining tool to the state's greatest advantage without appreciable victimization of the public. Were we to judicially narrow the scope of immunity, we would emasculate that advantage at a far greater expense to the citizenry than would otherwise occur—and in the process raise serious doubts as to the state's good faith.

Conflict of decisions invoking our jurisdiction herein arose because the Fourth District gave a retroactive application to the holding in Headley v. Baron (decided in 1969), supra, to the question whether Petitioner was rendered immune to a forfeiture of his dental license at the time he was compelled to testify in 1967, contrary to the rationale of Florida Forest and Park Service v. Strickland, supra. We conclude that Petitioner had a sufficient property right in his dental license to receive the protection of the rule of the Strickland case. However, we rest our decision here not on retroactivity, but on reinstatement of the holding in Seymour.

We acknowledge that the Florida State Board of Dentistry and the Fourth District Court of Appeal should not be held accountable for error because they took the Headley case at face value. This Court freely acknowledges that its erroneous decision in that case generated the related action below.

We direct that the order revoking Petitioner's dental license be quashed, but that the one-year suspension for malpractice stand.

It is so ordered.

BOYD, McCAIN and DENIS, JJ., Concur
DREW, J., (Retired) Dissents with opinion
ROBERTS, Acting Chief Justice, and ADKINS, J., Dissent

I dissent on both the assumption of jurisdiction and on the merits.

JURISDICTION

The decision of the District Court of Appeal simply states "Certiorari Denied". Petitioner argues that it was on the authority of the decision of this Court in Headley v. Baron, 221 So.2d 231 (Fla. 1969).[1] But, he asserts, Headley should be prospective only and, since Lurie, the petitioner here, was granted immunity from criminal prosecution for receiving a stolen automobile before the decision in Headley, [which held such immunity did not protect one from administrative disciplinary proceedings] that Headley[2] was not controlling. Petitioner's argument on this point, taken from his original brief, states "The general rule is that the overruling of a decision is ordinarily retrospective as well as prospective in application, and makes the law at the time of the overruled decision as it is declared to be in the overruling decision. An exception to this general rule is, however, that "an overruling decision cannot operate retrospectively so as to impair the obligation of contracts entered into or injuriously affect vested rights acquired in reliance on the overruled decision". C.J.S. Courts §194 p. (Emphasis added) In other words, that Lurie acquired a vested right under Seymour to be immune from disciplinary proceedings by the respondent board for unethical conduct arising out of the criminal acts for which he was granted immunity from prosecution in the

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1. Petitioner - in his original brief - says "The Headley decision indicated that immunity granted from criminal prosecution covered only investigations, proceedings or trials. . . The Court indicated that administrative disciplinary proceedings were not a penalty or forfeiture, nor an investigation, proceeding or trial within the meaning of the immunity statute Chapter 935 F.S., and were therefore outside the purview of any immunity from criminal prosecution previously granted." He further states with reference to the above quotation "This is the law in the State of Florida at this time . Petitioner does not dispute this fact." (Emphasis added)

2. Headley overruled the previous decision of this Court, Florida Board of Architecture v. Spencer, 625 So.2d 1, which held that the immunity statute then in force encompassed immunity from disciplinary proceedings by administrative bodies, in that case, the Florida Board of Architecture.

right to practice dentistry - as well as
licensing of professions that are publicly licensed
regulated. [illegible] vested right as used in the cases.[3]
refore, [illegible] stage of conflict to support jurisdiction.

Moreover, it seems to me ironical that this Court could
rule [illegible] decision - on the basis of which the District
rt admittedly decided the case under review - and then hold
t the District Court's decision conflicted with a previous
ision of this Court on the same point of law. And yet, that is
ctly what has been done here.

MERITS

The statute involved here is now Sec. 914.04 Florida Statutes
S.A.). It reads as follows:

> "No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, state attorney, or county solicitor, upon investigation, proceeding, or trial for a violation of any of the criminal laws of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding." (Emphasis added)

statute refers to the criminal statute, to the conviction of
rime and that no testimony so given or produced shall be received

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In Fischweinger v. York, 18 So.2d 8, this Court said:

> ". . . When conflicts occur between the right of the citizen to follow such profession and the right of the state to preserve the general health and welfare, the right of the citizen in the matter must yield to the power of the state to prescribe such reasonable restrictions and regulations as may be necessary to protect the people from ignorance, incapacity, deception or fraud. . . ."

tute, it is respectfully submitted, clearly refers to criminal
ecution and is limited thereto.

The statute allows the State's Prosecutor to grant immunity
a criminal prosecution to one of the participants of a crime in
er to require his testimony to convict the other participant
the crime. The statute is rooted in the criminal law and applies
y to criminal law. From the very beginning, this statute was one
nting immunity only from criminal prosecution.

In Headley v. Baron, supra, we thoroughly analyzed the immunity
tute, formerly 932.29 and now Section 914.04 Florida Statutes,
only on the question of the immunity statute, but also the
rfeiture rule", which is not involved in this case and therefore
not before this Court.

The record shows that petitioner did not testify before an
istant state's attorney because of any statute, ordinance or
e which required him to testify or lose his job. This Court
wered any question in this regard in Headley when we said:

> "Baron did not testify before the grand jury because of the 'forfeiture rule'. His claimed protection here is the 'immunity statute', not some benefit or amnesty promised by the 'forfeiture rule'. This distinguishes the instant case from Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). There, New Jersey had no immunity statute. Garrity, a police chief, testified in response to an investigation subpoena under the compulsive pressure of a job forfeiture statute. In a subsequent criminal proceeding, a confession which he made during the investigation was held to be inadmissible against him because it had been coerced by the statutory threat of removal from office if Garrity had claimed the benefit of his constitutional privilege against self-incrimination. Garrity involved a criminal prosecution based on a confession compelled by the threat of removal from office."

Petitioner in his second brief on the merits relies heavily
on the overruled case of Florida State Board of Architecture v.

After the original argument this Court requested the parties to
ief the question of whether Headley v. Baron was erroneous and
ould be overruled. The case was reargued on this side issue.

be examined. The opinion then sets forth Sections 932.08 and 932.29 (now 914.04, Florida Statutes 1941, F.S.A., and said Section 838.08 was set forth as follows:

> "838.08 Any person giving a reward, compensation or consideration prohibited by §838.06 shall not be privileged from testifying, but if he does testify, nothing said by him in his testimony shall be admissible in evidence in any civil or criminal action against him." (Emphasis added)

This statute was amended in 1941 and now reads as follows:

> "No person shall be excused from attending and testifying, or producing any book, paper or other document, before any court upon any investigation, proceeding or trial for a violation of either §838.06 or §838.071, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. However, no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or things concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding." (Emphasis added)

The Legislature removed from the statute the language that nothing said should be admissible into evidence in any civil or criminal action. It is apparent that the Legislature meant to and did delete any reference other than upon criminal investigation or proceedings, which is exactly what we held in Baron.

In the Semmelink case, supra, this Court said that the statute exempted anyone from prosecution, penalty or forfeiture, and then stated that the real point for determination was whether or not the proceeding for revocation of an architect's certificate amounts to a prosecution, penalty or forfeiture contemplated by the statute and then goes on to say:

> ". . . Whether the prosecution, penalty or forfeiture has to do with a civil or criminal action is not material. The statute first mentioned makes it applicable to both."

The statute referred to by this Court was changed and amended after this opinion, and it is quite clear that the first statute no longe

he was referring to was Section 839.09, Florida Statutes.

Seymour cites a New York case, in re Rouss, 221 N.Y. 81, 116 N.E. 782, in which this Court stated:

> ". . .It is true that in this case the Court of Appeals of New York held that a proceeding of disbarment was not a prosecution, penalty or forfeiture within the terms of the New York immunity statute. . . ."

It is abundantly clear that the words penalty and forfeiture in the statute involved here relate to the consequences of a criminal prosecution and conviction, and it is respectfully submitted that any other interpretation would be to read into the statute something which is simply not there. Garrity v. New Jersey, supra, has no applicability here. We are concerned with an immunity statute. We are not concerned with a criminal prosecution, not a constitutional right, nor with a statute or ordinance compelling someone to testify. There is no analogy made between the Garrity case and the case before this Court.

The right to earn a living and the privilege to practice dentistry are not one and the same. A person who has, through improper conduct in the practice of dentistry, had such privilege revoked or suspended may, in accordance with Chapter 466.08(6), Florida Statutes, initiate proceedings relative to the reissuance of a revoked or suspended license.

The Court today - in the shadow of Watergate - has made a tragic mistake in overruling Baron, supra. It is a regressive step. Its implications and consequences are impossible to calculate. The majority hold that if one of the officials or agencies designated in the statute had knowledge of an illegal drug ring and had reasons to believe that a dentist was or was not connected therewith, but could supply information, called the dentist in to question him concerning such traffic and thereupon found that not only was the dentist dealing and trafficking in such drugs, but was even conspiring to steal said drugs and dispensing them to, in

officer by [illegible] the dentist would be granting him immunity from prosecution. [illegible] this were also extended to the profession of dentistry and its [illegible] administrative procedures, as the majority now hold, not only could the dentist continue in the practice of dentistry, but also his federal narcotic stamp could be retained, allowing him to [illegible] and dispense narcotics. If this decision stands, the mandate laid down by the Legislature to protect the health, safety and welfare of the public will become sterile.

In In re Rouss, supra, Mr. Justice Cardozo construes a New York statute using, in part, the exact language of the Florida Statute relating to penalty or forfeiture as it relates to disciplinary proceedings against a lawyer. Justice Cardozo, after explaining the charges of misconduct preferred against the attorney, states:

> ". . . [illegible] these charges he makes answer that he is immune from discipline by force of section [illegible] of the Penal Law, which says that:
>
> "'No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee upon any investigation, proceeding or trial for a violation of any of the provisions of this article (article 54, and defining and punishing conspiracy), upon the ground that for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial.'
>
> "The question is whether disbarment is a penalty or forfeiture within the meaning of that statute.
>
> "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Selling v. Radford, 243 U.S.46, 37 Sup.Ct. 377, 611 L.Ed. 585; Matter of Durant, 80 Conn.140,147, 67 Atl. 497, 10 [illegible]. 539. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for

a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment. Ex parte Wall, 107 U.S. 265, 2 Sup.Ct. 569, 27 L.Ed. 552; Matter of Randall, 11 Allen (Mass.) 473, 480; Matter of Randel, 158 N.Y. 216, 52 N.E. 1106; Boston Bar Ass'n. v. Casey, 211 Mass. 107, 192, 97 N.E. 751, 39 L.R.A. (N.S.) 116, Ann.Cas. 1911A, 1151; Matter of Durant, supra.

"'The question is', said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion.' Ex parte Brounshall, Cowp. 829.

"'It is not', he continued, 'by way of punishment; but the court, on such cases, exercise their discretion whether a man who may have formerly admitted is a proper person to be continued on the roll or not.'"

The Court goes on to say:

"The problem before us, let it be recalled, is one solely of statutory construction. There is no question of constitutional right. The Constitution says that no person 'shall be compelled in any criminal case to be a witness against himself.' Const. art. V, § 6. A proceeding looking to disbarment is not a criminal case. Matter of Rouss, supra. We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime. There must be a broader privilege by statute or at common law. If that is so, the Constitution does not assure its preservation. Perrine v. Striker, 7 Paige, 598, 602; People ex rel. Hackley v. Kelley, 24 N.Y.74, 82,83; Counselman v. Hitchcock, 142 U.S.547,562, 12 Sup.Ct. 195, 35 L.Ed. 1110.

"Where speech will expose to penalties unrelated to crime, the Legislature may withdraw the privilege of silence. It has done so in the past. Perrine v. Striker, supra; Kaufmann v. Smith, 3 Paige, 222,231, 24 Am.Dec. It may do so again.

". . .

"Following that suggestion, section 584 of the Penal Law and like statutes (see, e.g., Penal Law, §§380 and 381) were enacted. Their purpose was to make the Constitution and the statute coextensive and consistent. Penalties and

VIII

exemption [illegible] penalties and forfeitures imposed upon the offender as part of the punishment of the crime. United States v. Reisinger, 128 U.S. 398, 9 Sup.Ct. 99, 32 L.Ed. 480; Boyd v. United States, 116 U.S.616, 6 Sup. Ct.524, 29 L.Ed. 746; Lees v. United States, 150 U.S. 476, 14 Sup.Ct. 163, 37 L.Ed. 1150; United States v. Regan, 232 U.S.37, 34 Sup.Ct. 213, 58 L.Ed. 494; La Bourgogne (C.C.) 104 Fed. 823. The statute is a grant of amnesty. The witness is to have the same protection as if he had received a pardon. Brown v. Walker, 161 U.S.591,596, 16 Sup. Ct. 644, 40 L.Ed. 819; Burdick v. United States, 236 U.S. 79, 35 Sup.Ct. 267, 59 L.Ed. 476. It is conceivable that the intention was to give him even more. But a pardon, as we have seen though it blots out penalties and forfeitures does not render the courts impotent to protect their honor by disbarment. Matter of an Attorney, supra. The Legislature cannot have believed that in the interpretation of a grant of amnesty exemption from penalties and forfeitures would receive a broader meaning. Disbarment therefore is not within the range of the exemption. That was the ruling in Matter of Biggars, 24 Okl. 842, 104 Pac.1083, 25 L.R.A. (N.S.) 692, in circumstances not to be distinguished from those before us. It is a ruling well sustained by precedent and reason.

"There are two other lines of argument which by different methods of approach lead to the same goal. One argument is purely verbal. It points to the concluding words of the statute:

"'No testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial.' Penal Law, §584.

"The use of the word 'criminal' helps to explain and characterize the kinds of penalties and forfeitures within the range of the exemption. But there is another argument more significant than any verbal one. The argument is that, unless the immunity is limited to criminal penalties and criminal forfeitures, the state has promised more than it can perform, and the whole statute becomes illusory. . . ."

". . .

"Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided. The claim of immunity from disbarment cannot survive the application of that test. If the exemption protects lawyers, it must equally protect physicians whose licenses have long been subject to revocation for misconduct. Public Health Law, §170; Consol. Laws, c. 45; 1 R.S. 692, §3; Matter of Smith, 10 Wend. 449; Allinson v. Gen. Council of Medical Education, (1894) 1 Q.B. 750. Two great and honorable professions have in that view been denied the right to purify their membership and vindicate their honor. The charlatan and rogue may assume

pose as a minister of justice. Such things cannot have been intended, and will not be allowed.

"The order of disbarment should be affirmed." (Emphasis added)

In concluding this lengthy dissent, I am compelled to point out that one of the authorities cited in the majority opinion as support for the statement that Baron, supra, is erroneous and should be overruled, viz. 2 Am.Jur. Administrative Law 1268, concludes with the statement: "However, the privilege against self-incrimination offers no protection against administrative sanctions which are not criminal or penal in nature." The cases cited are likewise inapplicable because they relate to immunity from criminal prosecution because of forced testimony in an administrative proceeding under statutes providing for such immunity.

It is inconceivable to me, to use only one example, that a law enforcement officer under civil service could be brought before a grand jury or state's attorney, confess to participation in criminal activities and then effectively bar suspension or removal from office and thereafter wear the badge of authority and remain the symbol of the law - and yet, that is what this decision of the majority will permit. The majority opinion can only further deteriorate public respect for the government and those who govern, which, everybody knows has now reached a historic low.

I dissent.

ROBERTS, Acting Chief Justice and ADKINS, J., concur

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

Procedures of the Committee on Grievances

Many attorneys who receive requests for explanatory information, or who are required to attend hearings before the Committee, are not familiar with the procedures of the Committee or its quasi-official status under relevant provisions of law and the Rules of the Appellate Division. Too frequently, therefore, they fail to make satisfactory responses to inquiries from Counsel for the Committee, fail to seek independent legal advice in cases of a more serious nature when they should be represented by or at least take advice from counsel, and even fail to gather their evidence until hearings before the Committee are under way. Some cases, indeed, go to hearings unnecessarily, when diligent cooperation with Counsel for the Committee might have disposed of the complaint without the service of a charge letter or the holding of any hearings before the Committee.

This leaflet has been prepared to provide helpful information for attorneys who receive requests for explanatory information concerning a complaint that has been filed with the Committee.

The Committee and Its Staff

The Committee on Grievances is a standing Committee of The Association of the Bar of the City of New York. It consists of a Chairman and twenty-four members, appointed by the President

EXHIBIT "D"

of the Association. Although the members of the Committee contribute their time and effort as a public service, the Committee's case load is such that for many years it has employed a staff of full-time attorneys, clerks and secretaries. The staff is under the charge of the Chief Counsel, who acts under the direction of the Committee and its Chairman. The cost of maintaining the services rendered by the Committee is quite large: funds for this purpose are provided by the Association, which receives only partial reimbursement from the County of New York as directed by the Appellate Division pursuant to express provision of the Judiciary Law.

The Committee is thus not to be regarded as an informal body that acts in disciplinary matters on an ad hoc basis. It is a quasi-official body that acts under the By-Laws of the Association, under a well established body of statutory and decisional law, and under rules and directives of the Appellate Division. It has authority to investigate charges of professional misconduct, to compel the attendance of witnesses and the production of records, to take testimony under oath, to admonish respondents in appropriate cases, and (after approval by the Executive Committee of the Association) to initiate and prosecute disciplinary proceedings before the court. It also has jurisdiction over cases involving the conduct of members of the Association as such.

Pre-hearing Investigation by Committee Staff

The Committee or its Chief Counsel may initiate any investigation or may undertake the same upon complaint by any

person. In an ordinary year, several thousand complaints against attorneys are filed with the Committee. These are processed in the first instance by Counsel. All complaints involving prima facie allegations of misconduct are thoroughly investigated. After the initial interview with the complainant, additional information or evidence is frequently requested. Where necessary, court files, bank records, and any other relevant documents are promptly obtained. The respondent-attorney is required either to submit a written statement concerning the allegations of the complaint or to appear in person, depending upon the nature and complexity of the issues raised. He may be requested to produce certain records for examination by Counsel. Frequently, the Committee's staff, in the course of an inquiry, interviews or communicates with the complainant and with the respondent-attorney several times.

Any inquiry from Counsel should be acknowledged and answered promptly and with complete candor; cooperation with Counsel in conferences is equally essential. Failure to reply, to cooperate or to be candid is improper; it obstructs the necessary work of the Committee, and not infrequently results in formal charges that might otherwise not be served. Moreover, in and of itself, it constitutes professional misconduct under the Canons of Professional Ethics and decision of the courts unless predicated upon an asserted claim that a response might tend to incriminate, Spevack v. Klein, 385 U.S. 511 (1967).

When the comprehensive investigatory process has been

completed, the staff attorney handling the matter recommends either that appropriate proceedings be initiated, that a letter admonition be sent to the respondent-attorney or that the matter be closed. This recommendation is then reviewed by the Chief Counsel. If no further action is recommended, the file is further reviewed by a member of the Committee.

A determination that appropriate proceedings be initiated results, in the usual case, in the filing of formal charges and the scheduling of a hearing before the Committee. In cases concerning crimes involving moral turpitude or where the public interest requires prompt action, a hearing before the Committee is dispensed with and a recommendation is made to the Executive Committee that disciplinary proceedings be instituted in the courts directly.

Letter admonitions, signed by the Chief Counsel, are sent in instances where the staff investigation discloses relatively minor misconduct. If, upon receipt of such a letter admonition, the respondent-attorney disputes the conclusion that he has not acted properly, he may request a formal hearing before the Committee. Complaints disposed of by letter admonition are subject to reopening if in the future a complaint is received against the respondent-attorney which required the institution of formal charges.

The experience of the Committee shows that attorneys would frequently be well advised, in more serious cases, to consider consulting counsel of their own at the beginning of

an inquiry. It is always advisable for them to be represented once formal charges have been filed and hearings scheduled. The great majority of attorneys who are the subject of hearings are represented, but there remains a minority who continue to represent themselves. At the same time, there has been an increase in the number of matters heard by the Committee which have resulted in referrals to the Court. While there is no necessary correlation between these factors, undoubtedly the position of the attorney facing formal charges is better presented and more adequately explained when he is represented by counsel. Consequently, the Committee strongly urges that every attorney who is the subject of charges seriously consider the immediate retention of counsel, if he has not done so up to that time.

For the purpose of holding hearings, the Committee is divided into three panels of eight members each, which sit one afternoon (Tuesday through Thursday) per week, commencing at 4:00 P.M., under the chairmanship of the Chairman, a Vice-Chairman or an acting Vice-Chairman. Ordinarily, the hearings start with the presentation of evidence by Committee Counsel. Witnesses are sworn. A stenographic record is taken. Cross-examination is permitted. Documentary evidence may be offered. The rules of evidence are generally followed to maintain order, to expedite the proceedings and to protect substantive rights. Counsel for the Committee rest at the termination of their direct case. It is then in order for the respondent to present his

case. Rebuttal is permitted at the conclusion of the respondent's case, and such other proceedings may be directed by the Committee as the interests of justice may seem to require. The hearings may be carried forward from week to week, or they may be terminated in a single session, depending on the case.

Post-Hearing Proceedings

When the hearings end, the panel considers the case in executive session. Its decision may take one of three forms: it may dismiss; it may admonish; or it may recommend prosecution. In the latter event the Committee submits a written report to the Executive Committee of the Association and requests authority to proceed in court. If this request is approved, formal charges are filed with the Appellate Division. If the charges are entertained the court ordinarily appoints a referee to hear and report. The evidence before the Committee, including the transcript and any documentary evidence, may figure prominently in the proceedings before the court or before the referee, and such proceedings frequently include a review of the conduct of the respondent during the preliminary investigation by the staff. This further emphasizes the importance of the preliminary investigation: it illustrates why an attorney who acts ill-advisedly in the preliminary stage of an inquiry may thereby incur a disadvantage which may persist throughout the pendency of the charge.

In disciplinary proceedings before the court, neither the Committee nor the referee suggest that any particular form of discipline should be administered. They merely present the

facts, and the court, if it sustains the charges, retains the prerogative of determining for itself whether the respondent should be censured, suspended or disbarred. If the court finds that the charges are not sustained, they are dismissed.

An admonition by the Committee is, in effect, a rebuke and a suspension of further action. The admonition is administered in private, and the only record of it remains in the files of the Committee. There is no further action unless the respondent thereafter becomes the subject of another charge, at which time the previous admonition is brought to the attention of the Committee and may receive weight in its determination. In the event of a disciplinary proceeding in the court, the original complaint may be made one of the charges, or the fact of the prior admonition may be made known to the court for such weight as the court may give it in reaching a determination.

For those who may wish to go more deeply into the subject-matter of this memorandum, reference is made to the following provisions of law and By-Laws of The Association of the Bar of the City of New York:

By-Law XIX

Section 90, Judiciary Law

Part 603 of the New York Court Rules

Part 609 of the New York Court Rules

EXHIBIT D - CONFIDENTIAL OUTLINE OF PROCEDURES OF THE COMMITTEE ON GRIEVANCES

The Association of the Bar
of the City of New York
36 West 44th Street

October 1970

CONFIDENTIAL

OUTLINE OF PROCEDURES OF THE

COMMITTEE ON GRIEVANCES

I.

The Association of the Bar of the City of New York was incorporated by Chapter 819 of the Laws of 1871 for the purpose, among others, of "facilitating the administration of justice" and "elevating the standard of integrity, honor and courtesy in the legal profession".

One of the Association's instrumentalities created to carry out these purposes is the Committee on Grievances, which is empowered "to consider and investigate the conduct of any member of the Association wherever he may be practicing and of any other attorney: (a) who resides, maintains an office or practices law within the City of New York; or (b) who was admitted to practice in the First Judicial Department; or (c) where the conduct under investigation took place, in whole or in part, within the City of New York". As a matter of practice, complaints against attorneys maintaining offices outside the First Judicial Department (New York and Bronx Counties) are referred to the appropriate local bar association.

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The Appellate Division, in Matter of Branch, 178 Div. 585 (1st Dept. 1917), defined the role of the Committee in disciplinary matters as follows:

> "...It has long been the practice of this court to refer to said committee for investigation, in the first instance, complaints against members of the bar to see whether such complaints furnish sufficient ground for the submission of formal charges. Its work has been of the most important character and has been of great assistance to the court. When so proceeding, as the learned official referee has well said, its acts are quasi judicial, for on its conclusions formal charges are presented to the court."

As Judge Cardozo said, in People ex rel. Karlin v. Culkin, 248 N.Y. 475, speaking of the Bar: "If the house is to be cleaned, it is for those who occupy it, rather than for strangers, to do the noisome work."

The duties performed by the Association through its Grievance Committee are important to the community and vital to the members of the Bar in preserving public confidence in the integrity of lawyers and the part they play in the administration of justice.

II.

Subdivision (10) of Section 90 of the Judiciary Law establishes the general rule that "any complaint, inquiry, investigation or proceeding relative to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed

private and confidential" until such time as charges are sustained by the Appellate Division. The Justices of the Appellate Division are given discretion to disclose the records in a given case, even when charges are not sustained. It is clear, however, that all proceedings before the Committee on Grievances are confidential and that no member can answer any questions relating to any proceeding or its pendency until after the court has sustained the charges.

III.

The Committee, which maintains offices at 36 West 44th Street, next door to the House of the Association, receives complaints against attorneys from a great variety of sources, including other attorneys, clients, judges, law enforcement agencies, and other bar associations.

The Committee and its Chief Counsel are also empowered to initiate investigations on their own motion.

IV.

All complaints within the Committee's purview are initially evaluated by a member of the staff. Those involving minor fee disputes, requests for advice, misunderstanding of the law or of the duty of the attorney, or other allegations not involving misconduct, are closed at an early stage of the staff's investigation. In such instances, the complainant is advised of the action taken and the reason therefor. The respondent

ordinarily is not called upon to answer the complaint and may never know of its existence.

It will be recognized that many matters, lacking merit as complaints, must nevertheless be given considerable attention since the Committee performs an important function in explaining to members of the public complications arising in the handling of their cases not attributable to misconduct by their attorneys; in easing personality conflicts; and, in general, in promoting a better understanding between the public and the Bar. These and other matters which do not involve true grievances against attorneys, may not be summarily dismissed if this Committee is to do its part in improving the stature of the profession.

Complaints which, upon initial evaluation, present a prima facie case of misconduct are further investigated. The attorney involved may, in the first instance, be asked for an explanation. The Committee recognizes that a visit to its offices is time consuming and may be an unnecessary

burden upon a busy practitioner. Therefore, he is usually requested to submit his explanation in writing. Personal interviews are scheduled where complaints involve complicated transactions requiring personal discussion; where the written explanation submitted is insufficient or unresponsive; and when requested by the attorney concerned.

Whenever required, the staff conducts interviews of material witnesses and obtains relevant evidence. If it becomes necessary to record the sworn statements of witnesses as part of an investigation, such witnesses may be required to appear before a panel of the Committee. When functioning in this capacity, the Committee panel acts as an investigatory body, as distinguished from its function of hearing and determining charges against an attorney. [By-Law XIX (4)]

In order to obtain expeditious disposition of complaints, specific dates are set for the submission of written statements and for interviews. Failure of the attorney to adhere to such time limits, which may be modified for good cause, in itself constitutes misconduct and may result in an additional formal charge of failing to cooperate with a duly constituted committee on grievances. He may, however, not be disciplined for refusing to answer if he asserts that to do so would tend to incriminate him, Spevack v. Klein, 385 U.S. 511

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Upon the completion of its investigation, the staff again evaluates the matter. Where the complaint is found unwarranted or where there is insufficient evidence to support it, both the complainant and the attorney involved are notified accordingly.

Where the investigation by the staff discloses a breach of the Canons not so grave as to warrant formal hearings, a letter of admonition is sent to the respondent-attorney calling to his attention the impropriety of his conduct. Such letters are intended to assist the respondent-attorney in meeting proper professional standards and to advise him that any further misconduct will result in formal charges. If the respondent-attorney disputes the conclusion that he has not acted properly, a hearing is, of course, scheduled.

Complaints involving conviction for a crime involving moral turpitude, not amounting to a felony under New York law, are referred directly to the Association's Executive Committee for prosecution in the courts without a prior hearing before the Committee on Grievances, pursuant to By-Law XIX (12). In some instances, on the ground that the public interest requires prompt action, cases not involving conviction for a crime are also referred directly to the Executive Committee for prosecution in the court without prior hearing before the Committee on Grievances. These cases usually involve established misconduct by an attorney which appears to be continuing and therefore constitutes an immed-

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iate threat to the public. Conviction of a crime constituting a felony under New York law results in automatic disbarment.

All complaints not otherwise disposed of under the procedures heretofore discussed; that is, those which after investigation appear to involve relatively serious misconduct, are scheduled for hearings before the Committee on Grievances.

V.

The Committee presently consists of 25 members and a Chairman, subdivided into three panels which meet on an average of once a week. Hearings usually last two hours, although many extended sessions are held. If a case is not concluded within one session, it is continued on adjourned dates, as nearly sucessive as possible, before the same panel.

In conformity with the By-Laws, hearings are initiated by a formal complaint, also known as a "charge letter", which sets forth the misconduct alleged. The attorney against whom charges are made is referred to as "the respondent". He must file his answer to the charges in advance of the date scheduled for the hearing. Prior to the day of the hearing, both the charge letter and the answer, if possible, are forwarded to the members of the panel which will hear the evidence. The members are expected to familiarize themselves with the charge letter and any answer thereto prior to the hearing. At the hearing, the respondent is entitled to be represented by counsel, to call witnesses in his own behalf, and to cross-examine witnesses called by the Committee staff.

In some instances, respondents have appeared on the date set for hearing, without counsel and without having submitted an answer, to request an adjournment. The Committee's calendars are carefully planned. If the requested adjournment is granted, the Committee will have met needlessly. Such requests should, therefore, be carefully weighed by the panel chairman in the light of the respondent's reason for his failure to be prepared, the notice which the respondent has been given, and any prior adjournments which may have been granted. If adequate opportunity to answer and to obtain counsel has previously been given the respondent, the Committee should refuse the request and require him to answer orally, under oath, and to proceed pro se.

The hearing is non-public. Testimony is taken under oath and the entire proceeding is recorded. While every effort is made to avoid technicalities which would serve only to delay or to prevent full disclosure of all the facts, the hearing is conducted in substantial accordance with normal court room procedures. The admissible evidence is limited to those matters which are put in issue by the charges and the respondent's answer. Testimony which is not material is excluded. Strict adherence to the standard of materiality assures expeditious handling and limits the record. In general, it is best that questions by Committee members, addressed to a witness, be deferred until Committee counsel

and respondent's counsel hav finished their respective examinations, and it is also desirable, where convenient, to channel questions through the panel chairman. The foregoing leads to a record that is not unduly cumbersome and of greater use to the court, which is particularly important in those instances where the Appellate Division decides to render its opinion upon the basis of the record before the Committee on Grievances and without referral to a referee (see below).

There is a strong tendency on the part of respondents to testify in narrative form, thus increasing the danger of burdening the record with extraneous and immaterial matters. Whenever narrative testimony is given, the panel chairman should exercise a firm hand in seeing to it that such testimony is kept within bounds.

If, during the course of the hearing, evidence is presented which reveals misconduct on the part of the respondent other than that charged, the subcommittee hearing the case may, after notice to the respondent and an opportunity to answer, consider the new matter as an additional charge [By-Law XIX (5)].

At the conclusion of the hearing, the case is considered in executive session. The first issue to be resolved is the guilt or innocence of the respondent. The Committee may dismiss the charges or find the respondent guilty as charged, in whole or in part. If the respondent is found guilty, the Committee may

(a) admonish the respondent, or (b) decide that the case warrants prosecution in the courts.

Charges of a serious nature which the Committee finds sustained are reported to the Association's Executive Committee with a recommendation that they be prosecuted in the courts. The Committee may limit its action to an admonition in those matters where (1) the charges are of a less serious nature; (2) there are compelling mitigating circumstances; and (3) the Committee concludes that a personal admonition will sufficiently impress the respondent, so as to make it probable that he will not engage in further misconduct. If the admonished attorney engages in further misconduct, the prior admonition may be considered by the Committee and the Court in determining the proper disposition of the matter.

Three members of a panel constitute a quorum. Action other than dismissal of the charges shall be taken only upon the affirmative vote of at least four of the members of the committee or subcommittee hearing the case. Two of them must personally have heard all the evidence while the remaining two, if absent from Committee hearings, must read the transcript. Consequently, in those instances where because of absence only two members have personally heard the entire case, the record must be transcribed, an expense usually avoided unless prosecution of the matter in the courts is recommended. It also makes

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a bad impression on the public and the respondent if only a few members of the panel are present. The respondent certainly has a right to expect that most, if not all, members will be sitting. These factors demonstrate that regular attendance by all members is of great importance to the accomplishment of the Committee's objectives.

If the Committee concludes that a case should be prosecuted in court, a report of the facts found is transmitted to the Executive Committee with a recommendation for prosecution. This report is ordinarily prepared by Committee counsel and is submitted in draft to the panel chairman and then approved by the Committee Chairman. No report is submitted to the Executive Committee when the Grievance Committee dismisses the charges, except where the complaint was initiated by a sitting judge, in which case the action of the Committee must be reported to the Executive Committee for final disposition. A recommendation for prosecution made to the Executive Committee is not made known to the respondent until that Committee has acted upon the report. If the respondent is a member of the Association, the Committee on Grievances may adjudge [By-Law XIX (9)], in addition to other action taken, that the respondent be expelled or suspended or otherwise disciplined. Such action, in order to become effective, has to be approved by the Executive Committee.

VI.

When the Executive Committee concludes that prosecution in the courts is warranted, a petition is prepared by the Committee counsel and a proceeding begun in the Appellate Division, First Department. The respondent is required to file an answer before the return date. If an issue of fact is created by the answer, the matter is usually sent to a referee and the proceeding tried de novo. There have been a few instances in which the court has decided the case upon the record before the Committee on Grievances.

The Association, as petitioner, and the respondent ordinarily submit memoranda to the referee, who thereafter renders his report with opinion to the court. A motion is thereafter made to confirm, disapprove, or modify the report. Printed briefs are submitted to the court. The Appellate Division censures, suspends or disbars the respondent or dismisses the case. A right of appeal to the Court of Appeals is granted by Judiciary Law, Section 90, subdivision (8). Such appeals are limited to questions of law, as provided by article six, section seven, of the Constitution of the State. The Court of Appeals has repeatedly refused to review the discipline imposed, holding that it will not substitute its judgment for that of the Appellate Division. Matter of Flannery, 212 N.Y. 610, 611; Matter of Goodman, 199 N.Y. 143; Matter of Axtell, 257 N.Y. 210.

Proceedings to discipline an attorney for misconduct are not considered penal in nature. Their primary purpose is to protect the public in its reliance upon the integrity and responsibility of the profession. Matter of Gould, 4 A.D. 2d 174, 175 (1st Dept.1957). Such proceedings are judicial in nature, Doe v. Rosenberry, et al., 255 F. 2d 118 (1958), and the acts of the Committee in investigating a complaint are considered quasi-judicial. Matter of Branch, 178 App.Div. 585, 588 (1st Dept. 1917).

VII.

The Committee's staff attorneys are: John G. Bonomi, Chief Counsel; Ronald Eisenman and Martin J. Linsky, Associate Counsel; and John C. Klotz, Richard E. Borda and Paul W. Pickelle, Assistant Counsel.

VIII.

It is suggested that each member of the Committee review, prior to the first meeting, the Code of Professional Responsibility; Section 90 of the Judiciary Law; Section 603, New York Court Rules; and By-Law XIX of the Association.

Benjamin C. Milner, III
Chairman

EXHIBIT E - LETTER OF ARTHUR S. OLICK TO POWELL PIERPOINT DATED MARCH 7, 1974 21sa

Law Offices

KREINDLER, RELKIN, OLICK & GOLDBERG

DONALD L. KREINDLER
DONALD B. RELKIN
ARTHUR S. OLICK
GEORGE E. GOLDBERG
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500 FIFTH AVENUE
NEW YORK, NEW YORK 10036
(212) 594-9000
CABLE: KROGLEGIS

March 7, 1974

Powell Pierpoint, Esq.
Hughes, Hubbard & Reed
One Wall Street
New York, New York 10005

Re: Committee on Grievances
Matter of [redacted]

Dear Sir:

We are counsel to [redacted] Esq., an attorney against whom disciplinary proceedings have been instituted by the Committee on Grievances of the Association of the Bar of the City of New York. We write to you in your capacity as Chairman of that Committee and as a member of the panel which heard evidence in this matter on June 21, 1973 and thereupon determined to recommend to the Executive Committee that the matter be sent to the Appellate Division for further proceedings.

For the reasons hereinafter set forth, we respectfully request that the proceedings before the Grievance Committee be re-opened and a new hearing held before a different panel.

First, it appears that at the time of the hearing, your law firm was involved in four separate legal matters with respondent's firm, only one of which was disclosed. You may recall that you were not scheduled to sit as a member of the panel to hear Mr. [redacted] case and, therefore, he was not afforded the opportunity of challenge afforded by subdivision 6 of Section XIX of the Association's By-Laws. You arrived at the hearing unannounced and unheralded. Apparently recognizing a potential problem, you promptly advised Mr. [redacted] that your firm was involved in the so-called "Spartans-Arlen's merger" wherein you represented the Lybrand Ross accounting firm and Mr. [redacted] partner, [redacted], was handling the plaintiff's claim. This was a reference to a class action

entitled Weisfeld v. Spartans Industries, Inc., et al., then pending in the United States District Court for the Southern District of New York (71 Civ. 781).

What was not disclosed to Mr. [redacted] and what he didn't know at that time was that your firm was then involved with his office in three other matters. These were (a) the Matter of Basic Sciences Inc.; (b) SEC v. Securities Investor Protection Corporation v. F.O.Baroff Company, Inc., U.S.D.C., S.D.N.Y. 72 Civ. 60; (c) SEC v. Securities Investor Protection Corporation v. Weiss Securities, Inc., U.S.D.C., S.D.N.Y. 73 Civ. 2332. In the Basic Sciences matter (wherein your firm replaced Mr. [redacted]'s firm as counsel to the company), Mr. [redacted]'s firm sought, unsuccessfully, for over a year to have your firm issue an opinion permitting Mr. [redacted] and others to sell certain securities and to have your firm effect payment to Mr. [redacted]s firm of an outstanding legal fee of some $4,271.32. Your firm is represented in this matter by your partner, Edward S. Davis and both aspects continue to remain unresolved. The Baroff and Weis Securities matters were litigations wherein your partners, John S. Alee and Edward S. Redington, were trustees and your law firm acted as counsel. Mr. [redacted]s firm, in one case, represented a defendant who had pledged certain securities which the trustee sought to have turned over.

Had Mr. [redacted] been aware of the full scope and extent of the relationship between your firm and his, he most certainly would have asked that you not participate in the proceedings. Indeed, when Mr. [redacted] was originally advised of the composition of the panel, he exercised his rights under By-Law XIX and excused Bruce Hecker, Esq., whose law firm represented one of the principals involved in the proceedings underlying the Committee's action against him. Your sudden appearance at the hearing deprived the respondent of an opportunity to investigate these facts subsequently uncovered.

It is certainly NOT suggested that you deliberately withheld any information or that you exercised other than your reasonable judgment. Nevertheless, we do suggest that, in the interests of justice and due process of law, even an appearance or possibility of impropriety should be avoided and, therefore, Mr. [redacted] should be afforded a new hearing.

We are certain that you will agree that proceedings before the Committee on Grievances must be conducted impartially and with due regard for procedural due process. It is of transcendent importance that our profession, in disciplining itself, adhere to the strictest and highest procedural standards and thereby set an example to others respecting the requisites of an orderly society under the rule of law. As Cyrus R. Vance, Chairman of the Special Committee on the Second Century, noted in the 1973 issue of the Record of the Association, decisions of the bar should properly involve "all of those qualities which ought to characterize any lawyerly decisions."

Second, the inclusion in the charge letter circulated by Committee Counsel to each member of the panel in advance of the hearing highlighted a prior and entirely unrelated disciplinary proceeding involving the respondent, thereby tending to prejudice the panel before it heard the evidence in this proceeding. As you may be aware, it is the practice of Committee Counsel in preparing written charges to include therein a statement of any other disciplinary matters concerning the respondent. This practice appears to be purely gratuitous. It is certainly not sanctioned by Subdivision 4 of By-Law XIX which limits charge letters to "stating plainly the matter or matters charged."

Importantly, an attorney charged with professional misconduct is entitled to both procedural and substantive due process. Disciplinary proceedings are punitive in nature and may be regarded as quasi-criminal. [In re Ruffalo, 390 U.S.554 (1968)]. It is a fundamental rule that evidence of prior convictions is inadmissible to show that a defendant is guilty of the crime charged. Michelson v. United States, 335 U.S. 469 (1948); Luck v. United States, 348 F.2d 763 (D.C.Civ. 1965). At best, evidence of a prior disciplinary matter may be appropriate for presentation after the panel has decided guilt and in connection with the question of punishment under subdivision 8 of By-Law XIX.

Mr. [redacted] was entitled to a fair and impartial hearing. Instead, the issues were obfuscated by reference to his difficulties in 1956- eighteen years ago - at the time of and in the climate of the Arkwright Committee. It is of significance that he devoted no less than eight of the eleven pages of his answer, and a

considerable portion of his testimony, to explaining his prior involvement which was and is entirely unrelated to the charges underlying the present proceeding. Mr. [redacted] duly protested this action of Committee Counsel, but to no avail.

Third, recent cases indicate that the use against an attorney in a disciplinary proceeding of evidence obtained under a grant of immunity violates the attorney's constitutional privileges against self-incrimination and deprivation of property without due process of law. Here, the proceedings against Mr. [redacted] are based entirely on evidence obtained by a Grand Jury under a grant of immunity. Whereas earlier cases rejected the applicability of the Fourth and Fifth Amendment privileges to disciplinary proceedings, distinguishing between criminal and civil matters, more recent cases have now eliminated this distinction [United States v. U.S.Coin & Currency, 401, U.S.715 (1971)] and have applied the privileges in a variety of areas not previously within their scope. An attorney's right to assert the privilege in a disciplinary proceeding was upheld in Spevak v. Klein, 385 U.S.511 (1967), and a dentist's in Lurie v. Florida State Board of Dentistry, 264 So.2d 479 (1973), aff'd Sup. Ct. Fla. 10/25/73. Thus, the trend of recent cases casts serious doubt on the legal sufficiency of the proceedings against this respondent.

Whereas this latter point might be regarded as one more properly for the Court than for the Committee, the first two points do relate directly to Committee practices and procedures. Certainly, the Committee should make every effort to secure for members of the bar, in disciplinary proceedings, the benefit of every procedural doubt and thereby insure the ultimate in due process protection for the accused.

Accordingly, we respectfully request that Mr. [redacted] be granted a new hearing, which hearing, hopefully, would not be subject to the questions raised in support of this application.

Very truly yours,

Arthur S. Olick

ARTHUR S. OLICK

ASO:bk

cc: Hon. John G. Bonomi

US COURT OF APPEALS: SECOND CUCIRCUIT

Index No.

ANONYMOUS,
Plaintiff-Appellant,

against

THE ASS. OF THE BAR OF THE CITY OF NEW YORK,
Defendants - Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 12th day of October 1974 at 36 W. 44th St., New York
November

deponent served the annexed Brief upon

Bar Association of New York

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 12th day of November 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975